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# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 642

JOEL A. BURNS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 323 F. 2d 269.

### JURISDICTION

The judgment of the court of appeals was entered on September 27, 1963. On October 23, 1963, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 26, 1963, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether petitioner waived a claim of immunity when he voluntarily entered pleas of guilty with the

advice of counsel and with full knowledge of his rights.

2. Whether the District Court in Florida abused its discretion under Rule 32(d) of the Federal Rules of Criminal Procedure when it denied petitioner's motion to withdraw his pleas of guilty made after sentence had been imposed, where that motion was based solely on that fact that, after petitioner had entered his pleas of guilty in Florida, a District Court in Utah upheld a claim of immunity in a companion prosecution.

3. Whether petitioner was ever immune from prosecution.

## STATUTE AND RULE INVOLVED

Section 22(c) of the Securities Act of 1933, 15 U.S.C. 77v(c) provides:

> No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise except that such individual so testifying shall

not be exempt from prosecution and punishment for perjury committed in so testifying.

Rule 32(d) of the Federal Rules of Criminal Procedure provides:

> **Withdrawal of Plea of Guilty.** A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

## STATEMENT

1. Petitioner was indicted in the Southern District of Florida on May 31, 1961 on 36 counts charging violations of the Securities Act, mail fraud, and conspiracy (R. 1–46). One count of the indictment was, on petitioner's motion, transferred to Utah for trial (R. 107–109).

Before trial in Florida, petitioner filed a supplemental motion to dismiss the indictment based on the claim that he had acquired immunity under 15 U.S.C. 77v(*c*) (R. 75–86). A hearing on that motion was held on January 23, 1962, just prior to the commencement of petitioner's trial (R. 183–224).

At the hearing petitioner testified that on September 16, 1957, he voluntarily appeared at the offices of the Securities and Exchange Commission in Salt Lake City, Utah, in the company of an attorney, and that both before and after being sworn he claimed his privilege not to testify concerning the affairs of the Columbus-Rexall Oil Company, on the ground that his testimony might tend to incriminate him (R. 186–189). Petitioner was not granted immunity at

this inquiry and indeed was specifically informed that immunity was not granted (R. 82, 198, 140, 204). When petitioner asserted his privilege against self-incrimination, the hearing examiner stated: "Let the record show that this office has no authority at this time to extend to you, Mr. Burns, the immunity provided by section 21(b) of the Securities Act of 1933. Let the record show further that [we] ceased our interrogation then where you claimed your privilege against self-incrimination" (Pet. App. 5).

Three years later, on October 24, 1960, petitioner was served with a subpoena duces tecum issued by the Securities and Exchange Commission requesting production of all records in his possession pertaining to the Columbus-Rexall Oil Company and related corporations (R. 84–85). In response petitioner appeared at the offices of the Commission in Salt Lake City where he deposited various records including certain allegedly personal records (R. 85–86, 193–194, 199). Petitioner, who was not represented by counsel at the time, asserted no claim of privilege as to any of these records: he neither requested nor was offered immunity from prosecution (R. 196–200).

On November 23, and December 20, 1960, petitioner appeared before the Commission in Salt Lake City (R. 147) and testified without asserting his privilege against self-incrimination (R. 196–197, 202–204), although he was advised by the hearing examiner that he was not required to testify (R. 202, 203).

On the basis of the foregoing evidence, the district

court below denied petitioner's claim of immunity (R. 225–226).

2. Immediately after that ruling, petitioner's trial commenced. On January 26, 1962, during the progress of the trial, petitioner entered pleas of guilty to Counts I and XXI of the indictment. The proceedings as to him were severed and continued for sentence (R. 114–115). On February 15, 1962, petitioner moved to withdraw his pleas of guilty and substitute pleas of nolo contendere. The ground for this motion, as stated by petitioner's attorney, was the following (R. 115–116):

> Defendant, Joel A. Burns, has heretofore, through his counsel, filed a Motion to Dismiss on the grounds of immunity granted pursuant to the provisions of Sec. 77v(c) of Title 15 of the U.S.C., which Motion was, after Hearing, denied by the Honorable George C. Young. Counsel for the Defendant feels very strongly that the Defendant is entitled to and should have an appellate review of this ruling and feels that a plea of guilty would bar the right of appellate review and that a plea of Nolo Contendere would not constitute a bar to an appellate ruling.

The following day—the day on which sentence was to be imposed—petitioner, through his attorney, withdrew the pending Motion for Leave to Substitute Plea, thereby deliberately abandoning his claim to a "right of review" of the district court's order denying his supplemental motion to dismiss based on the alleged immunity. In withdrawing the motion, petitioner's attorney stated to the court (Pet. App. 7):

> Your Honor, there is a pending motion in this matter, but after consultation with Government counsel and with the defendant, we withdraw that motion.

A fine of $10,000 and a two-year suspended sentence were then imposed, and counsel for the government withdrew the remaining 33 counts of the indictment (R. 116–118).

3. On February 19, 1962, petitioner filed a motion under Rule 32(d) of the Federal Rules of Criminal Procedure to withdraw his pleas of guilty and to vacate his conviction and sentence (R. 118), on the ground that three days before, on February 16, 1962, the District Court of Utah had recognized his claim of immunity and dismissed the indictment pending there (R. 118–120). The district court denied the motion (R. 143).

Petitioner then filed a petition for rehearing of his earlier motion to dismiss on the ground of immunity (R. 130–131). The district court denied this petition on March 23, 1962 (R. 161). Petitioner next filed a Motion to Vacate Sentence and Stay Proceedings (R. 161) and a Renewed Motion to Withdraw Plea of Guilty, to Vacate Adjudication of Guilt and to Vacate Sentence on the same ground (R. 167). On March 28 and March 29, 1962, respectively, these motions, too, were denied (R. 169, 171).

Petitioner thereupon moved for reduction of the fine which had been imposed against him (R. 170). On April 6, 1962, the district court modified the terms of payment, allowing petitioner additional time to

meet the $10,000 fine, but otherwise denied the motion (R. 172).

The court of appeals unanimously affirmed the judgments of the district court, holding that petitioner's guilty pleas, "in the absence of proof that they were coerced or made otherwise than freely, voluntarily and with a full understanding of the consequences as well as all constitutional rights involved, constitute a waiver of a previously attained immunity" (Pet. App. 10).

Although the court of appeals did not decide whether petitioner ever acquired immunity or whether the production of his personal records constituted a waiver thereof (Pet. App. 9), the court did state that it was "inclined to agree" with the district court's finding that petitioner did not have immunity even prior to his guilty pleas (Pet. App. 9).

## ARGUMENT

1. Before entering his pleas of guilty in the Florida court, petitioner unsuccessfully asserted a claim of immunity. He was plainly aware, therefore, that immunity was an issue which he could contest if he so chose. Indeed, even after the plea had been entered, petitioner moved initially to change it to nolo contendere with the declared objective of raising the question of immunity on appeal. Yet, with the advice of counsel, he deliberately withdrew that motion before sentence. There can thus be no question on this record that petitioner consciously and deliberately waived the claim of immunity in Florida, electing instead to rely on the benefits which he thought would

accrue to him from a plea of guilty. His attempted abandonment of that deliberate strategy comes too late.

As petitioner admits (Pet. 7–8), "a voluntary plea of guilty constitutes an admission of the pleaded facts and a waiver of all non-jurisdictional defects." See, *e.g.*, *Thomas* v. *United States*, 290 F. 2d 696 (C.A. 9), motion for leave to file petition for writ of certiorari denied, 368 U.S. 964; *Russell* v. *United States*, 212 F. 2d 87 (C.A. 4), certiorari denied, 347 U.S. 1020; *Harris* v. *United States*, 237 F. 2d 274 (C.A. 8). An immunity defense does not go to the jurisdiction of the court. It is purely a personal defense and, as such, waivable. Moreover, even if immunity were a jurisdictional matter, it would relate only to personal jurisdiction, which, unlike jurisdiction over subject matter, may be waived in a criminal case. *United States* v. *Rosenberg*, 195 F. 2d 583 (C.A. 2), certiorari denied, 344 U.S. 838; *Pon* v. *United States*, 168 F. 2d 373 (C.A. 1); cf. Rule 34 of the Federal Rules of Criminal Procedure. See also *Caballero* v. *Hudspeth*, 114 F. 2d 545 (C.A. 10), which held that the constitutional right against double jeopardy is a personal right which may be waived by a plea of guilty. *A fortiorari*, the right to assert an immunity claim—a statutory defense—may be so waived.

Petitioner's reliance on *Edwards* v. *United States*, 312 U.S. 473, is misplaced, for in that case the accused protected his claim of immunity by entering a plea of nolo contendere. Here petitioner deliberately forfeited his right to raise the claim on appeal by with-

drawing the motion to change his plea to nolo contendere.

To be sure, *United States* v. *Harris*, 133 F. Supp. 796 (W.D. Mo.), held that the defense of the statute of limitations, apparent from the face of the indictment, is not waived by mere failure to raise the issue before plea. That case, however, does not represent the weight of authority; it has constantly been held that a statute of limitation defense may be waived in a criminal case.[1] In any event, the defense of immunity involved here not only did not appear on the face of the indictment, but was consciously waived.

2. In view of petitioner's deliberate strategy, there was no "manifest injustice" in refusing to allow him to withdraw his pleas of guilty after sentence had been imposed. As we show below, his claim of immunity, though subsequently upheld by another court, was of questionable validity. Instead of relying upon that doubtful claim, he purposefully chose to enter a plea of guilty. In doing so petitioner well "knew and understood what was being done and there was not present any circumstances of force, mistake, misapprehension, fear, inadvertence or ignorance of his rights and understanding of the consequences of the plea." See *United States* v. *Colonna*, 142 F. 2d 210, 211 (C.A. 3).

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[1] See, *e.g.*, *United States* v. *Parrino*, 212 F. 2d 919 (C.A. 2), certiorari denied, 348 U.S. 840; *United States* v. *Taylor*, 207 F. 2d 437 (C.A. 2); *Forthoffer* v. *Swope*, 103 F. 2d 707 (C.A. 9); *Askins* v. *United States*, 251 F. 2d 909, 913 (C.A.D.C.); *United States* v. *Troxell*, 12 U.S.C.M.A. 6; *United States* v. *Gelb*, 175 F. Supp. 267 (S.D.N.Y.), affirmed, 269 F. 2d 675 (C.A. 2), certiorari denied, 361 U.S. 822; and cf. *United States* v. *Cook*, 17 Wall. 168.

3. While the validity of the claim of immunity is not at issue here, in view of petitioner's deliberate decision to plead guilty, it should be noted that petitioner's claim was at best debatable.

To avail himself of the immunity provision of the Securities Act of 1933, a witness must establish (1) that he invoked his privilege against self-incrimination; and (2) that he was compelled to testify after having invoked the privilege.[2] When petitioner responded to the subpoena duces tecum of October 24, 1960, by delivering corporate records of Columbus-Rexall Oil Company and certain allegedly personal records to a representative of the Securities and Exchange Commission, he in no way invoked or even mentioned his privilege against self-incrimination. The privilege, of course, would not in any case have applied to the corporate records called for by the subpoena. *Wilson* v. *United States,* 221 U.S. 361; *Curcio* v. *United States,* 354 U.S. 118. And if petitioner desired to assert the privilege as to his personal records it was his duty to claim it specifically and to segregate those records as to which the privilege could be applied. *Landy* v. *United States,* 283 F. 2d 303 (C.A. 5), certiorari denied, 365 U.S. 845; *In re Verser-Clay Co.,* 98 F. 2d 859 (C.A. 10), cer-

[2] Section 22(c) of the Act, 15 U.S.C. Section 77v(c), in pertinent part, reads "* * * [N]o individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is *compelled, after having claimed his privilege against self-incrimination,* to testify or produce evidence, documentary or otherwise except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying." (Emphasis added.)

tiorari denied, 306 U.S. 639; see *Wagman* v. *Arnold*, 257 F. 2d 272 (C.A. 2); *United States* v. *Guterma*, 174 F. Supp. 581 (E.D.N.Y.); *United States* v. *Cayias*, 200 F. Supp. 790 (S.D. Fla.). Admittedly petitioner had invoked the privilege three years earlier, but on that occasion the claim of privilege was honored and petitioner was advised he would not be granted immunity. Under these circumstances, when petitioner responded to a subpoena which called 'generally for the production of corporate records,' he could properly be required to notify

[3] The subpoena duces tecum stated in part that appellant was to appear in the Commission's Salt Lake Office "to testify in the Matter of Columbus-Rexall Oil Co. involving possible violations of Section 9(a) and 5(c) of the Securities Act of 1933, as amended.

"And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents.

"All original correspondence, memoranda, books and other records, of whatever nature, or copies thereof, of or pertaining to Columbus Rexall Consolidated Mines Company or Columbus-Rexall Oil Company and the predecessors or successors thereof; Beachline Production Corporation, a Nevada Corporation; Adaven Oil Company, a Nevada Corporation; Titan Uranium, Inc., a Nevada Corporation; Great Chief Uranium Company, a Nevada Corporation; San Rita Oil, Inc., a Utah Corporation; United Caribbean Oil and Mining Enterprises, Inc., a Liberian Corporation; United Caribbean Oil, Inc., a Cuban Corporation; and Alberc'f Petroleum, Ltd., a Canadian Corporation, of Long Beach, California, which may be held in your possesssion, custody or control.

"The books, papers and documents to be produced shall include, but are not of necessity limited to; articles of incorporation; letters; memorandums; journals or other records of original entry; ledgers; bank deposit slips; bank statements; cancelled bank checks; purchase and sales contracts; deeds; leases; assignments; minutes of meetings of stockholders and directors;

the government that he was including personal records as well. Otherwise a custodian of corporate records could avoid prosecution merely by mingling a few personal records among a large batch of corporate records without asserting a claim of privilege where, as in this case, he had some years earlier made a general claim of the privilege against self-incrimination.

It is significant that at this later hearing petitioner voluntarily chose to testify, although he was explicitly warned of his privilege against self-incrimination.[4]

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1964.

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capital stock certificates, issued and unissued, cancelled or uncancelled; lists of stockholders; capital stock ledgers; and other records; capital stock issuance and transfer data and instructions; invoices; statements of account; income tax returns; tax statement; and vouchers." (R. 84–85.)

[4] *United States* v. *Eisele*, 52 F. Supp. 105 (D.D.C.), and *United States* v. *Goodner*, 35 F. Supp. 286 (D. Colo.), cited by petitioner (Pet. 11) in support of his claim of immunity, are inapposite because in both cases the defendant asserted his privilege against self-incrimination at the same hearing in which he was compelled to testify.

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